

No. 91-372

Supreme Court, U.S.
FILED
DEC 19 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF GEORGIA, PETITIONER

v.

THOMAS MCCOLLUM, ET AL.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on grounds of race in the exercise of peremptory challenges.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	5
Argument:	
The Constitution prohibits a criminal defendant from exercising a peremptory challenge based on the juror's race	7
A. Race-based peremptory challenges violate equal protection principles	7
B. A criminal defendant's exercise of a peremptory challenge constitutes state action	11
1. A peremptory challenge exercised by a criminal defendant is an action that is fairly attributable to the state	11
2. The adversarial relationship between the defendant and the prosecution does not affect the governmental character of the peremptory challenge	17
3. Application of constitutional constraints to the defendant's peremptory challenges does not infringe the defendant's rights	19
C. The prosecutor has standing to object to the discriminatory exercise of defense peremptory challenges	25
Conclusion	26

TABLE OF AUTHORITIES

Cases:

<i>Allen v. Hardy</i> , 478 U.S. 255 (1986)	8
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	1, 3, 8, 17, 19, 20, 21, 22, 23, 24
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954)	10
<i>Boon v. State</i> , 1 Ga. 618 (1846)	14
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980)	19

IV

Cases—Continued:	Page
<i>Connecticut v. Doeher</i> , 111 S. Ct. 2105 (1991)	10
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)	15
<i>Edmonson v. Leesville Concrete Co.</i> , 111 S. Ct. 2077 (1991)	<i>passim</i>
<i>Ford v. Georgia</i> , 111 S. Ct. 850 (1991)	8
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972)	10
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987)	8
<i>Ham v. South Carolina</i> , 409 U.S. 524 (1973)	24
<i>Hayes v. Missouri</i> , 120 U.S. 68 (1887)	22, 23
<i>Hernandez v. New York</i> , 111 S. Ct. 1859 (1991)	20
<i>Holland v. Illinois</i> , 493 U.S. 474 (1990)	7, 8, 14, 20, 22
<i>Jones v. State</i> , 1 Ga. 213 (1846)	14
<i>Lugar v. Edmondson Oil Co.</i> , 457 U.S. 922 (1982) ..	10, 12
<i>McCoy v. Court of Appeals of Wisconsin</i> , 486 U.S. 429 (1988)	21
<i>Mu'Min v. Virginia</i> , 111 S. Ct. 1899 (1991)	24
<i>Mitchell v. W.T. Grant Co.</i> , 416 U.S. 600 (1974)	10
<i>Nix v. Whiteside</i> , 475 U.S. 157 (1986)	21
<i>People v. Kern</i> , 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, cert. denied, 111 S. Ct. 77 (1990)	25
<i>Peters v. Kiff</i> , 407 U.S. 493 (1972)	25
<i>Polk County v. Dodson</i> , 454 U.S. 312 (1981)	18, 19
<i>Powers v. Ohio</i> , 111 S. Ct. 1364 (1991)	4, 8, 25
<i>Ristaino v. Ross</i> , 424 U.S. 589 (1976)	24
<i>Rosales-Lopez v. United States</i> , 451 U.S. 182 (1981)	24
<i>Ross v. Oklahoma</i> , 487 U.S. 81 (1988)	20
<i>San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.</i> , 483 U.S. 522 (1987)	10
<i>Sealy v. State</i> , 1 Ga. 213 (1846)	14
<i>Shelley v. Kraemer</i> , 334 U.S. 1 (1948)	16
<i>Singer v. United States</i> , 380 U.S. 24 (1965)	26
<i>Sniadach v. Family Finance Corp.</i> , 395 U.S. 337 (1969)	10
<i>State v. Anaya</i> , 96 Ariz. Adv. Rep. 133 (Ct. App. 1991)	25
<i>State v. Levinson</i> , 71 Haw. 492, 795 P.2d 845 (1990)	25

V

Cases—Continued:	Page
<i>Stilson v. United States</i> , 250 U.S. 583 (1919)	19-20
<i>Strauder v. West Virginia</i> , 100 U.S. 303 (1880)	9
<i>Swain v. Alabama</i> , 380 U.S. 202 (1965)	7, 8, 17, 20
<i>Terry v. Adams</i> , 345 U.S. 461 (1953)	15
<i>Thiel v. Southern Pac. Co.</i> , 328 U.S. 217 (1946)	24-25
<i>United States v. DeGross</i> , 913 F.2d 1417 (9th Cir. 1990), reh'g ordered, 930 F.2d 695 (1991)	2
<i>United States v. Greer</i> , 939 F.2d 1076 (5th Cir. 1991), reh'g ordered (Dec. 3, 1991)	2
<i>United States v. Tindle</i> , 860 F.2d 125 (4th Cir. 1988), cert. denied, 490 U.S. 1114 (1989)	21
<i>United States v. Zolin</i> , 491 U.S. 554 (1989)	21
Constitution, statutes and rule:	
U.S. Const.:	
Art. III, § 2, Cl. 3	15
Amend. V	9-10
Due Process Clause	9
Amend. VI	3, 15, 20, 21, 22
Amend. XIV	4, 8, 10, 15, 26
Equal Protection Clause	4, 8
Ga. Const. Art. I, § 1, para. XI	15
18 U.S.C. 243	25
42 U.S.C. 1983	18
Criminal Justice Act, 1988, ch. 33, pt. VIII, § 111 (Great Britain)	7
Ga. Code Ann. (Michie 1990):	
§ 15-12-9	13
§ 15-12-40	13
§ 15-12-42	13
§ 15-12-120	13
§ 15-12-131	13
§ 15-12-139	13
§ 15-12-160	3, 13
§ 15-12-163	3, 13
§ 15-12-164	13
§ 15-12-165	3, 12, 13
Laws 1833, <i>Cobb's Digest</i> (1851)	14
Fed. R. Crim. P. 24(b)	1

Miscellaneous:

Page

Alschuler, <i>The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts</i> , 56 U. Chi. L. Rev. 153 (1989)	23
4 W. Blackstone, <i>Commentaries</i> (Tucker ed. 1803)	7, 14
Gobert, <i>The Peremptory Challenge—an Obituary</i> , [1989] Crim. L. Rev. 528	7
Goldwasser, <i>Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial</i> , 102 Harv. L. Rev. 808 (1989)	20
Swift, <i>Defendants, Racism and the Peremptory Challenge: A Reply to Professor Goldwasser</i> , 22 Colum. Hum. Rts. L. Rev. 177 (1991)	21

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INTEREST OF THE UNITED STATES

The case presents the question whether the exercise of a peremptory challenge by a criminal defendant is governed by the standards of race neutrality that are applicable to the prosecution's peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986). Pursuant to the Federal Rules of Criminal Procedure, the defendant in a federal criminal case is entitled to exercise 20 peremptory challenges in a capital case; ten in a felony case; and three in a misdemeanor case. Fed. R. Crim. P. 24(b). The issue whether the Constitution places restrictions on a defendant's use of peremptory challenges has arisen in

a number of federal criminal cases. Two courts of appeals now have the issue under en banc review. See *United States v. DeGross*, 913 F.2d 1417, 1423-1424 (9th Cir. 1990), reh'g en banc ordered, 930 F.2d 695 (1991); *United States v. Greer*, 939 F.2d 1076, 1083-1086 (5th Cir. 1991), reh'g en banc ordered (Dec. 3, 1991). The United States therefore has a significant interest in the resolution of this case.

STATEMENT

1. On August 10, 1990, a grand jury sitting in Dougherty County, Georgia, returned a six-count indictment charging respondents with aggravated assault and simple battery. J.A. 2-5. The indictment alleged that, on January 5, 1990, respondents assaulted and beat Myra Collins. *Ibid.* Respondents are white; the alleged victim is black. J.A. 6. Shortly after the events giving rise to the indictment, a leaflet was widely distributed in the local black community reporting the assault and urging community members not to patronize respondents' business. J.A. 40.¹

¹ The leaflet, distributed by Rep. John White, Chairman of the Unity Community of Albany, Georgia, stated, in pertinent part (J.A. 40-41):

"*BE INFORMED . . .* The McCollum Family, owners of McCollum's Dry Cleaners located at 1703 E. Broad Ave. in Albany attacked, kicked and beat a young black woman and her husband with a baseball bat, several days ago as they attempted to pick up clothing and dry cleaning."

"This Community must respond to this violent act with 'non-violence' & direct action. *We urge you to select another Dry Cleaners for your clothing.*"

"The McCollums have *no respect* for your black sister & brother, your daughter & son, your wife & husband. Spend your money with people who respect you."

Under Georgia law, the petit jury in a felony trial is selected from a panel of 42 persons. Ga. Code. Ann. § 15-12-160 (Michie 1990). Both the defendant and the State may challenge jurors for cause. § 15-12-163. In addition, both the defendant and the State have the right to exercise peremptory challenges. When the defendant is indicted for a capital offense or an offense carrying a penalty of four or more years of imprisonment, the defendant "may peremptorily challenge 20 of the jurors impaneled to try him." § 15-12-165. For offenses carrying a lesser penalty, the defendant "may peremptorily challenge 12 of the jurors impaneled to try him." *Ibid.* In all cases, "[t]he state shall be allowed one-half the number of peremptory challenges allowed to the accused." *Ibid.*

Before jury selection began, the State filed a motion to prohibit respondents from exercising their peremptory challenges in a racially discriminatory manner. J.A. 6-8. After noting the race of the defendants and the victim, the State indicated that it expected to show that the victim's race was a factor in the alleged assault. J.A. 6-7. Observing that 43 percent of the Dougherty County population is black, the State also indicated that, if a statistically representative panel is assembled for jury selection, 18 of the 42 potential jurors would be black persons. With 20 peremptory challenges, respondents would therefore be able to remove all of the black potential jurors. J.A. 7. Relying on *Batson v. Kentucky*, 476 U.S. 79 (1986), the Sixth Amendment, and the Georgia Constitution, the State sought an order requiring that, if a prima facie case of racial discrimination by the defense is made out, respondents would be required to articulate a racially neutral explanation for their peremptory challenges. J.A. 7-8.

The trial judge denied the State's motion. The judge found that "[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner." J.A. 14. Recognizing that the issue was "one of first impression for the Georgia courts," the court certified the issue for immediate appellate review. J.A. 15, 18.

2. The Supreme Court of Georgia granted the application for interlocutory review and directed the parties to address, in particular, the question whether the Georgia Constitution prohibits race-based peremptory challenges by the defendant in a criminal case. J.A. 16-17. The State's opening brief contended that the state constitution does prohibit such strikes by the defense. J.A. 18-23. After this Court decided *Powers v. Ohio*, 111 S. Ct. 1364 (1991), and *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), the State filed supplementary briefs urging the supreme court to hold that not only Georgia law, but also the Equal Protection Clause of the Fourteenth Amendment prohibits a defendant from exercising racially discriminatory peremptory challenges. J.A. 42-45.

The reviewing court affirmed the trial court's ruling. J.A. 46-57. The court acknowledged that in *Edmonson v. Leesville Concrete Co.*, *supra*, this Court had found that racial discrimination in the exercise of a peremptory challenge "constitute[s] an impermissible injury" to the excluded juror. J.A. 46. The court noted, however, that *Edmonson* involved private civil litigants, not criminal defendants. *Ibid.* "Bearing in mind the long history of jury trials as an essential element of the protection of human rights," the court "decline[d] to diminish the

free exercise of peremptory strikes by a criminal defendant." *Ibid.*²

SUMMARY OF ARGUMENT

A. Both the defendant and the prosecution have long been granted peremptory challenges in this country. This Court has held, however, that the prosecutor's use of a peremptory challenge to exclude a juror on grounds of race violates the equal protection rights of the excluded juror. The Court has further held that a defendant may raise a claim of such discrimination whether or not the defendant's own equal protection rights are violated.

Because it is the government itself that creates and enforces peremptory challenges, this Court determined that it violates the Constitution for a private civil litigant to exercise a peremptory challenge based on the juror's race. The premise of that holding is that a litigant's exercise of the delegated right to exclude a person from jury service constitutes state action. The exercise of the challenge therefore triggers application of the Constitution's equal protection requirements.

B. A criminal defendant's exercise of a peremptory challenge is also properly viewed as state action that is subject to the constitutional constraint against action based on race. The features of the peremptory challenge system that make it appropriate to characterize a civil litigant's challenge as state action are equally present here. First, in criminal cases, as in

² Three justices dissented, arguing that *Edmonson* and other decisions of this Court establish that racially based peremptory challenges by a criminal defendant violate the Constitution. J.A. 47-49 (Hunt, J.); *id.* at 50-55 (Benham, J.), *id.* at 56-59 (Fletcher, J.).

civil cases, the peremptory challenge has its source in an express provision of state law. Second, a criminal defendant exercising a peremptory challenge invokes the authority of the State in the same fashion as a private civil litigant. A peremptory challenge is part of the framework of jury selection procedures established and administered by the State, and the defendant's peremptory challenge is ultimately enforced by the action of the trial judge in excusing the juror. From the perspective of the excluded juror, the impact of a discriminatory challenge is the same, whether the challenge is made by the State, by a criminal defendant, or by a private civil party.

Prohibiting race-based challenges by the defense neither violates the defendant's constitutional rights nor impairs his ability to secure a fair trial. Indeed, to leave the defense free to discriminate on racial grounds, in a manner that is prohibited for the prosecution, would give rise to a potential for imbalance in the composition of juries. Respondents have no constitutionally recognized interest in excluding minority jurors on grounds of race, and to accept such a claim would undermine public confidence in the integrity of the jury system.

C. The State has standing to assert the equal protection rights of a juror who is excluded on racial grounds at the instance of the defense. That conclusion follows not only from decisions of this Court allowing third-party standing for criminal defendants and civil litigants to object to discriminatory peremptory challenges by their adversaries, but also from the government's responsibility to protect the civil rights of its citizens. In light of that responsibility and the State's interest in securing a jury that is chosen by fair and legitimate procedures, the State is a proper

party to object to racially discriminatory challenges by criminal defendants.

ARGUMENT

THE CONSTITUTION PROHIBITS A CRIMINAL DEFENDANT FROM EXERCISING A PEREMPTORY CHALLENGE BASED ON THE JUROR'S RACE

A. Race-Based Peremptory Challenges Violate Equal Protection Principles

Georgia's provision of peremptory challenges to both the government and the accused in a criminal case accords with the longstanding and universal practice in state and federal courts in this country. See *Swain v. Alabama*, 380 U.S. 202, 212-219 (1965); *Holland v. Illinois*, 493 U.S. 474, 481 (1990). The practice has deep roots in English common law. See 4 W. Blackstone, *Commentaries* 353-354 (Tucker ed. 1803).³ As traditionally conceived, the "essential nature" of a peremptory challenge is a power that a litigant may use to exclude a particular juror even when the reasons for exclusion do not rise to a level that would justify removal of the juror for cause. *Swain*, 380 U.S. at 220. Because the peremptory challenge permits the parties to remove jurors whose bias is suspected but cannot be proved, the device is thought to enable the elimination of "extremes of

³ English practice, however, has changed. In the past century, the right to exercise peremptory challenges was rarely used in England. *Swain*, 380 U.S. at 213 n.12. Peremptory challenges were ultimately abolished in England by the Criminal Justice Act 1988, ch. 33, pt. VIII, § 111. See Gobert, *The Peremptory Challenge—An Obituary*, [1989] Crim. L. Rev. 528.

partiality on both sides.” *Holland*, 493 U.S. at 484, quoting *Swain*, 380 U.S. at 219. Peremptory challenges therefore further “the purpose of the jury system * * * to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.” *Powers v. Ohio*, 111 S. Ct. 1364, 1372 (1991).

Although historically well established, the peremptory challenge may not be exercised in violation of constitutional provisions such as the Equal Protection Clause of the Fourteenth Amendment. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court held that a prosecutor’s exercise of a peremptory challenge to exclude a potential juror on grounds of race violates the Equal Protection Clause. The Court explained that the purposeful exclusion of a juror because of race not only infringes the right of a defendant of the same race to equal protection of the laws, but also amounts to “unconstitutional[] discriminat[ion] against the excluded juror” and inflicts harm on the community as a whole by “undermin[ing] public confidence in the fairness of our system of justice.” 476 U.S. at 86-87. *Batson* overruled the holding of *Swain v. Alabama*, *supra*, that a defendant could not challenge the racially discriminatory use of peremptory challenges based solely on the prosecutor’s actions in a particular case. *Batson*, 476 U.S. at 82, 91-93, overruling *Swain*, 380 U.S. at 221-222. See also *Ford v. Georgia*, 111 S. Ct. 850, 855 (1991); *Griffith v. Kentucky*, 479 U.S. 314, 326 (1987); *Allen v. Hardy*, 478 U.S. 255, 258-259 (1986) (per curiam).

Recognizing that one of the interests underlying *Batson*’s holding is that of the excluded juror, this Court ruled in *Powers v. Ohio*, *supra*, that a defend-

ant may challenge a prosecutor’s race-based peremptory strike “whether or not the defendant and the excluded juror share the same race.” 111 S. Ct. at 1366. The Court explained that a juror who is peremptorily struck on grounds of race suffers a violation of his own equal protection rights; the defendant in such a case is appropriately accorded third-party standing to vindicate the excluded juror’s claim. *Id.* at 1370-1373. *Powers* reaffirmed the principle, embraced by this Court for more than a century, that “racial discrimination in the qualification or selection of jurors offends the dignity of persons and integrity of the courts.” *Id.* at 1366, citing, *inter alia*, *Strauder v. West Virginia*, 100 U.S. 303 (1880).

Until *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), all of the cases to reach this Court presenting the problem of racially discriminatory peremptory challenges involved claims of discrimination by prosecutors. Because those claims were directed at the conduct of government officials, responsibility for the discriminatory acts could readily be assigned to the government. In those cases, the “state action” that is required to trigger the Constitution’s protections of individual rights was established by the actions of the prosecutor, a quintessential state actor.

In *Edmonson*, by contrast, the contested peremptory challenges were exercised by a private defendant in a civil action; the plaintiff claimed that the defendant’s challenges violated the equal protection component of the Due Process Clause of the Fifth Amendment.⁴ This Court therefore confronted as a

⁴ The Fifth Amendment applied because the case was tried in federal court. See *Edmonson*, 111 S. Ct. at 2080, citing

threshold question whether state action was present at all in that setting. To answer that question, the Court employed the analytical framework summarized in this Court's decision in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982).⁵ As the Court observed in *Edmonson*, two inquiries are necessary to determine whether the actions of a private party are sufficiently attributable to the government to implicate constitutional protections: first, "whether the claimed constitutional deprivation result[s] from the exercise of a right or privilege having its source in state authority"; and second, "whether the private party charged with the deprivation could be described in all fairness as a state actor." 111 S. Ct. at 2082-2083, citing *Lugar*, 457 U.S. at 939-942. After a detailed analysis of the peremptory challenge system, the Court concluded that a private civil litigant is properly characterized as a state actor when exercising a peremptory challenge. Accordingly, the Court held that it violates the Constitution for such a per-

Bolling v. Sharpe, 347 U.S. 497 (1954). The standard for deciding whether a private person is a state actor is the same under the Fifth and the Fourteenth Amendments. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 & n. 21 (1987); see *Edmonson*, 111 S. Ct. at 2082-2083 (citing, interchangeably, Fifth and Fourteenth Amendment state action cases).

⁵ The Court in *Lugar* held that a private litigant is appropriately characterized as a state actor when he "joint[ly] participat[es]" with state officials in securing the seizure of property in which the private party claims to have rights. 457 U.S. at 932-933, 941-942; see *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); see also *Connecticut v. Doehr*, 111 S. Ct. 2105, 2111-2112 (1991).

son to use a peremptory challenge to exclude a potential juror on grounds of race. 111 S. Ct. at 2081-2087.

B. A Criminal Defendant's Exercise Of A Peremptory Challenge Constitutes State Action

The analysis in this case parallels the analysis employed by the Court in *Edmonson*: a criminal defendant, like a civil litigant, is appropriately characterized as a state actor when he exercises a peremptory challenge. The adversary relationship between the prosecutor and the defendant does not change the fact that, in exercising a peremptory challenge, the defendant is drawing upon a source of government power to affect the selection of the jury, a function that is intrinsically governmental. And the application of the procedures of *Batson* to a criminal defendant does not violate the defendant's rights.

1. A Peremptory Challenge Exercised by a Criminal Defendant Is an Action That Is Fairly Attributable to the State

Under *Edmonson*, the first inquiry in analyzing whether a private litigant acts on behalf of the State is whether the right being exercised derives from state law. The peremptory challenges considered in *Edmonson* satisfied that test, because they "are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who would otherwise satisfy the requirements for service on the petit jury." 111 S. Ct. at 2083. As in *Edmonson*, a Georgia defendant's peremptory challenge is made possible by a right having its source in state law. The defendant's right to exercise peremptory challenges

and the scope of that right are established by a specific provision of state law. Ga. Code. Ann. § 15-12-165 (Michie 1990).

The second inquiry is whether "the [private] party charged with the deprivation * * * may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937; *Edmonson*, 111 S. Ct. at 2083. In resolving that issue, *Edmonson* found it useful to apply three principles distilled from prior decisions: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2) "whether the actor is performing a traditional governmental function"; and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." 111 S. Ct. at 2083. As to the first principle, the *Edmonson* Court found that the peremptory challenge system, as well as the jury trial system as a whole, "simply could not exist" without direct and substantial government participation, and that private parties necessarily rely on governmental authority in exercising each challenge. *Id.* at 2084.

Describing the federal system, the Court explained that the government composes jury lists, establishes juror qualifications, summons the jurors to court, and pays them a *per diem* allowance for their appearance. Courts then assist in gathering information to determine whether the jurors should be challenged; typically, the court itself conducts the voir dire. Finally, the judge oversees the jury selection process and, "[w]hen a lawyer exercises a peremptory challenge," it is "the judge [who] advises the juror he or she has been excused." 111 S. Ct. at 2084. Based on those factors, and especially on "the direct and indispensable participation of the judge," the Court concluded that the exercise of peremptory challenges involves

the government with the challenged discriminatory conduct in a "significant way." *Id.* at 2085.

Georgia law similarly provides the defendant with the right to exercise peremptory challenges as one component of the State's overall procedure for selecting the jury. Georgia provides for the compilation of jury lists by the board of jury commissioners in each county and establishes the general criteria for service and the sources of citizens to produce a pool of qualified jurors representing a fair cross section of the community. Ga. Code. Ann. § 15-12-40 (Michie 1990). State law further provides that jurors are to be selected by a specified process, § 15-12-42; they are to be summoned to court under the authority of the State, § 15-12-120; and they are to be paid an expense allowance by the State whether or not they serve on a jury, § 15-12-9. At court, potential jurors are placed in panels in order to facilitate examination by counsel, § 15-12-131; they are administered an oath, § 15-12-139; they are questioned on voir dire to determine whether they are impartial, § 15-12-164; and they are subject to challenge for cause, § 15-12-163.

In felony cases, 42 jurors are empaneled, "from which the defense and the prosecution may strike jurors." § 15-12-160. The number of peremptory challenges is specified by statute, with the State being allowed one-half of the number allowed to the defense. § 15-12-165.⁶ When a peremptory challenge is exer-

⁶ Under Ga. Code. Ann. § 15-12-165 (Michie 1990), 20 challenges are allowed to the defendant when facing charges carrying a penalty of life or more than four years' imprisonment, and 12 are allowed for lesser offenses. These provisions, and the authorization for the State to exercise one-half the number of challenges given to the defendant, have long

cised, it is the trial judge who excuses the juror from service. In light of those procedures, the defendant in a Georgia criminal case relies on "governmental assistance and benefits" that are equivalent to those found in the civil context examined in *Edmonson*, 111 S. Ct. at 2083. "By enforcing a discriminatory peremptory challenge, the Court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.'" *Edmonson*, 111 S. Ct. at 2085 (citation omitted).

This Court found in *Edmonson* that the selection of a civil jury is a "traditional function of the government," 111 S. Ct. at 2085. The same conclusion applies with even greater force in the criminal context. The selection of a jury in a criminal case ful-

been part of Georgia law. See Laws 1833, *Cobb's Digest* 835 (1851); *Jones v. State*, 1 Ga. 610, 616-617 (1846). Before the 1833 statute, Georgia had followed the English rule, which gave the defendant 20 peremptory challenges in cases of murder and other felonies, while purportedly giving the prosecutor no challenges without cause, but leaving him the right to require jurors to "stand aside" without being "bound to show cause, till all the panel was called over, and not then, unless, from challenges or otherwise, the jury is incomplete." *Sealy v. State*, 1 Ga. 213, 216 (1846); W. Blackstone, *Commentaries* 353 (Tucker ed. 1803); see *Holland*, 493 U.S. at 481 n.1. In practice, this procedure was recognized as giving the prosecutor a far greater number of peremptory challenges than the defendant. *Boon v. State*, 1 Ga. 618, 619-620 (1846). After the legislature fixed the number of peremptory challenges, the Georgia Supreme Court held that the prosecutor's common law right to have jurors stand aside did not survive, see *Sealy*, 1 Ga. at 217, and that granting peremptory challenges to the prosecutor did not impair the defendant's common law or state constitutional rights. *Jones*, 1 Ga. at 616-617.

fills a unique, and constitutionally compelled, governmental function. The Sixth Amendment, made applicable to the States through the Fourteenth Amendment, *Duncan v. Louisiana*, 391 U.S. 145 (1968), requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."⁷ U.S. Const. Amend. VI. In determining the guilt or innocence of a defendant in a criminal case, the jury is unquestionably performing an official act of the government.⁸ The defendant's participation in the selection of that body "represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race." *Edmonson*, 111 S. Ct. at 2086; see *Terry v. Adams*, 345 U.S. 461 (1953) (finding state action in the activities of

⁷ The Sixth Amendment echoes Article III of the Constitution, which provides: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, Cl. 3. Similarly, the Georgia Constitution guarantees that "In criminal cases, the defendant shall have a public and speedy trial by an impartial jury." Ga. Const. Art. I, § 1, para. XI.

⁸ "[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan*, 391 U.S. at 156.

a private organization that conducted whites-only primaries, because the organization formed an integral part of the State's mechanism for selecting its officials).

Finally, *Edmonson* indicated that the courtroom setting in which the peremptory challenge is exercised intensifies the harmful effects of the private litigant's discriminatory act and contributes to its characterization as state action. 111 S. Ct. at 2083, 2087; cf. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (judicial enforcement of discrimination implicates the "clear and unmistakable imprimatur of the State"). The injury to equal protection values caused by the race-based exclusion of a juror is not diminished simply because the exclusion is at the behest of a criminal defendant.

At the conclusion of the jury selection process, the judge typically announces in open court that particular jurors have been excused and will not participate in the trial. If the judge advises each of the black prospective jurors that they "will not be needed" for jury service, it is not likely to matter much that the defense, rather than the prosecutor or the court, precipitated their removal. The perception—and the reality—will be that the court has excused all the black jurors from participating in the trial because of their race, an outcome that will be attributed to the State and will discredit the State's mechanism for resolving criminal cases. As in *Edmonson*, "[i]f peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system." 111 S. Ct. at 2087. When that occurs, the harm to the excluded juror, and to the legal system, is the product

of "governmental delegation and participation" in the peremptory challenge process. *Ibid.*⁹

2. *The Adversarial Relationship Between the Defendant and the Prosecution Does Not Affect the Governmental Character of the Peremptory Challenge*

That a criminal defendant is the adversary of the prosecution with respect to the charges against him does not change the state action analysis in this case. The particular function at issue here is the selection of the jury through peremptory challenges. In that specific role, the defendant uses a government-delegated right to choose the decisionmaker and thereby becomes a state actor for the purpose of applying constitutional prohibitions against racial discrimination.

The exercise of a peremptory challenge differs significantly from other actions taken in support of the defendant's defense. In a criminal trial, the defendant and his counsel make any number of tactical decisions, such as determining what defenses to raise, what questions to ask on cross-examination, what objections to make to the prosecutor's evidence, whether the defendant should testify, and what witnesses to call, if any. Those decisions by the defense are fundamentally private ones. Indeed, the defendant's

⁹ This Court stated in *Swain v. Alabama*, 380 U.S. 202, 227 (1965), that "[t]he ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials." *Swain's* approach to peremptory challenges was overruled in *Batson*, and its reasoning on this issue is not authoritative in light of *Edmonson*. Indeed, in *Batson* itself the Court remarked that it was expressing no view on whether the Constitution applies to defense peremptory strikes, thus treating the issue as an open one. *Batson*, 476 U.S. at 89 n.12.

right to make those decisions is constitutionally protected against arbitrary interference by the State. The peremptory challenge, however, is different: it is the State that gives the defendant the right to participate in the selection of the body that will evaluate both parties' evidence. The governmental nature of that function distinguishes the peremptory challenge from other functions of defense counsel that go to the defendant's effort to persuade the finder of fact to acquit him.

For that reason, a finding of state action in this case is consistent with *Polk County v. Dodson*, 454 U.S. 312 (1981). There, a defendant brought an action under 42 U.S.C. 1983 against the public defender who represented him on appeal from his conviction; the defendant claimed that the public defender had violated his constitutional rights in failing to provide adequate representation. This Court determined that a public defender does not qualify as a state actor when engaged in his general representation of a criminal defendant, a function that is "in no way dependent on state authority." 454 U.S. at 318.

The defendant's exercise of a peremptory challenge, however, is a function that is critically "dependent on state authority." The power to call—and excuse—jurors is exclusively a function of government. The right to exercise a peremptory challenge flows from the act of the legislature; its mechanism of enforcement is an action of the judge; and its effect is "to determine representation on a governmental body." *Edmonson*, 111 S. Ct. at 2086.

The determination of whether a private person is a state actor for a particular purpose depends on the nature and context of the function being performed.

For example, in *Branti v. Finkel*, 445 U.S. 507 (1980), this Court held that a public defender, in making personnel decisions on behalf of the State, is a state actor who must comply with constitutional requirements. And *Dodson* itself noted, without deciding, that "[i]t may be * * * that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions." 454 U.S. at 325. In this case, it is the particular role that the peremptory challenge plays in determining the composition of a governmental body that leads to the conclusion that the defendant's exercise of a peremptory challenge should be treated as state action.

That the defendant exercises a peremptory challenge to further his interest in an acquittal does not conflict with a finding of state action. Whenever a private actor's conduct is deemed "fairly attributable" to the government, it is likely that private motives will have animated the actor's decision. Indeed, in *Edmonson*, the Court recognized that the private party's peremptory challenges constituted state action, even though "the motive of a peremptory challenge may be to protect a private interest." 111 S. Ct. at 2086. Applying that principle here, the defendant's peremptory challenges are appropriately characterized as state action.

3. *Application of Constitutional Constraints to the Defendant's Peremptory Challenges Does Not Infringe the Defendant's Rights*

The Constitution does not require peremptory challenges; they are solely "a creature of statute." *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988); *Edmonson*, 111 S. Ct. at 2083; *Holland*, 493 U.S. at 481-482; *Batson*, 476 U.S. at 91; *Swain*, 380 U.S. at 219; *Stilson v.*

United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured."). Accordingly, the conclusion that equal protection principles are violated by the defendant's invidious use of peremptory challenges does not require a balancing of competing rights; the excluded juror's constitutional right to be free from racial discrimination is paramount to the defendant's statutory right to exercise a particular challenge.

Nor would application of the *Batson* procedures to defense peremptories threaten the Sixth Amendment right to the effective assistance of counsel.¹⁰ One commentator has argued that compliance with *Batson* would require defense counsel to explain the reasons for a particular challenge, which might occasionally require the disclosure of communications protected by the attorney-client privilege; counsel would then be forced either to give up the challenge or to reveal client communications and possibly trial strategy. Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 Harv. L. Rev. 808, 831-833 (1989). Those concerns provide no justification for refusing to protect the juror's constitutional rights.

¹⁰ Under *Batson*, if the defendant establishes a prima facie case of discrimination in the use of peremptory strikes, the burden shifts to the prosecutor to articulate a race-neutral explanation for the particular strikes in question. The trial court must then determine whether the defendant has demonstrated purposeful discrimination on grounds of race. *Batson*, 476 U.S. at 96-98; *Hernandez v. New York*, 111 S. Ct. 1859, 1865-1866 (1991) (plurality opinion) (describing the "three-step" inquiry under *Batson*).

Most peremptory challenges are based on general impressions gleaned during the parties' opportunity to observe and examine the jurors in court. Counsel can ordinarily explain the reasons for their peremptory challenges without revealing anything about their trial strategy or any confidential client communications.

In the rare case in which the explanation for a challenge entails confidential communications or would reveal trial strategy, in camera procedures can be devised to protect against unnecessary disclosure. See *United States v. Zolin*, 491 U.S. 554 (1989); cf. *Batson*, 476 U.S. at 97 (expressing confidence that trial courts can develop procedures to implement the Court's holding). Sixth Amendment values, even if implicated, would not be infringed by those procedures. See Swift, *Defendants, Racism and the Peremptory Challenge: A Reply to Professor Goldwasser*, 22 Colum. Hum. Rts. L. Rev. 177, 207-208 (1991). In any event, neither the Sixth Amendment nor the attorney-client privilege gives a criminal defendant the right to carry out through counsel an unlawful course of conduct. See *Nix v. Whiteside*, 475 U.S. 157 (1986) (defense counsel does not render ineffective assistance when he informs his client that he would disclose the client's perjury to the court and move to withdraw from representation); *Zolin*, 491 U.S. at 562-563; *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 443 (1988).¹¹

¹¹ Any incidental revelation of trial strategy caused by a *Batson*-type inquiry is, of course, equally applicable to the prosecution, so applying *Batson* to defendants would not impose any special burden on the defense. Cf. *United States v. Tindle*, 860 F.2d 125, 131-132 (4th Cir. 1988) (approving in camera *Batson* submissions by the prosecutor because of spe-

Far from compromising the defendant's rights, the extension of *Batson* to the defense prevents the defendant from skewing the jury unduly in his favor. "Although the [Sixth Amendment] guarantee [of an impartial jury] runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored." *Holland*, 493 U.S. at 483. The peremptory challenge, while offering some protection for the accused, is also a means for assuring jury impartiality for the government. In *Hayes v. Missouri*, 120 U.S. 68 (1887), this Court recognized that purpose in upholding, against an equal protection challenge, a statute that gave the State more peremptory challenges in capital cases tried in larger cities than in other locations. Approving Missouri's goal to secure an impartial jury, the Court stated that "such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Id.* at 70.

If a criminal defendant were permitted to engage in race-based strikes, it would provide an opportunity for significantly distorting the composition of the jury. In this case, for example, if a representative jury panel is called, respondents' 20 peremptory chal-

cial need to protect sensitive information), cert. denied, 490 U.S. 1114 (1989). Moreover, private parties enjoy the protection of the attorney-client privilege against the disclosure of confidential attorney-client communications, yet this Court in *Edmonson* held that that interest does not prevail over the rights of jurors not to be disqualified on racial grounds. The same analysis applies to the asserted interest in protection of attorney-client communications in the criminal context.

lenges would enable them to exclude all black potential jurors from the jury. J.A. 7. In jurisdictions that have permitted race-based strikes by the defense, peremptory challenges have been used by defendants to achieve all-white juries. See Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 195-196 (1989) (describing two trials in Miami, Florida, in which all black jurors were peremptorily challenged by white police officers accused of a racial beating). That use of the challenge undermines the traditional character of the jury as a body that represents all citizens, and is a mirror image of the problem that led to this Court's decision in *Batson* itself. See *Batson*, 476 U.S. at 101 (White, J., concurring) (noting "widespread" and persistent practice by prosecutors "of peremptorily eliminating blacks from petit juries in cases with black defendants"). Although an individual jury cannot and need not reflect the racial mix of the community, "[d]iscrimination by defense attorneys can undermine the democratic values of the jury system and subvert public confidence in the administration of justice as powerfully as racial discrimination by prosecutors." Alschuler, *supra*, 56 U. Chi. L. Rev. at 196.

This case illustrates that point. Respondents argued in the court below that, because a notice was circulated in the black community calling for a boycott of respondent's business in response to the altercation in this case, it is "essential for the defendants to have the right to utilize peremptory strikes to exclude blacks from the trial jury." J.A. 35.¹² Indeed,

¹² That contention is clearly without merit. The single, non-inflammatory notice distributed in the black community months

respondents went so far as to imply that, because the charges involve an assault on a black victim, a white defendant should automatically be entitled to exclude all black persons peremptorily.¹³ The claim that all blacks are incapable of serving as impartial jurors in respondents' trial is antithetical to basic assumptions underlying our jury system. The law provides the means to test bias in cases where race is an issue. See *Ham v. South Carolina*, 409 U.S. 524 (1973); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981). There can be no rule of presumptive prejudice that applies to all jurors of a particular race. "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of a religion." *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976). For the defense as well as the prosecution, our law reflects the principle that "[a] person's race simply is unrelated to his fitness as a juror." *Batson*, 476 at 87, quoting *Thiel v.*

before the trial (J.A. 38) could not possibly rise to the level of prejudicing all black jurors in the entire community. Cf. *Mu'Min v. Virginia*, 111 S. Ct. 1899 (1991) (pretrial publicity regarding the crimes with which the defendant was charged, though pervasive and intense and reaching most of the jurors, did not rise to the level requiring inquiry on voir dire about the individual jurors' knowledge of the contents of the publicity).

¹³ Respondents argued: "Should a person of Iraqi descent charged with committing an assault on a Jewish person be able to excuse by peremptory challenge Jewish jurors on the belief that such jurors could conceivably be inclined to be more partial to a Jewish prosecutor. To ask the question is to answer it. * * * The provisions of *Batson v. Kentucky*, *supra* are absolutely unworkable if applied to a criminal defendant." J.A. 35-36.

Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). As this Court stated in *Powers*, "[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns." 111 S. Ct. at 1370.¹⁴

C. The Prosecutor Has Standing To Object To The Discriminatory Exercise Of Defense Peremptory Challenges

In *Powers*, this Court concluded that a criminal defendant has standing to raise the equal protection rights of a black juror who was peremptorily challenged by the prosecutor on grounds of race. 111 S. Ct. at 1370-1373. In *Edmonson*, the Court held that the opposing litigant in a civil case has standing to assert the rights of an excluded juror who may have been victimized by a race-based challenge. 111 S. Ct. at 2087-2088. The holdings of those cases are equally applicable to the State's claim that it has standing to object to discriminatory peremptory challenges by a criminal defendant.

No extended analysis of the prosecutor's standing is required in this case, because, as the representative of all its citizens, the State is a logical and proper

¹⁴ The majority of state courts that have considered the question have concluded that discriminatory defense peremptories are unlawful, either under state or federal constitutional provisions. See, e.g., *People v. Kern*, 75 N.Y.2d 638, 554 N.E. 2d 1235, 555 N.Y.S.2d 647, cert. denied, 111 S.Ct. 77 (1990); *State v. Levinson*, 71 Haw. 492, 795 P.2d 845 (1990); *State v. Anaya*, 96 Ariz. Adv. Rep. 133 (Ct. App. 1991). In the federal system, even if a rule against racially discriminatory defense peremptory challenges were not constitutionally compelled, supervisory powers would justify the imposition such a bar in light of the strong federal policy against racial discrimination in jury selection. See 18 U.S.C. 243; *Peters v. Kiff*, 407 U.S. 493 (1972).

party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial. The Fourteenth Amendment imposes on the State the obligation to provide to persons within the State's jurisdiction the equal protection of the laws. Moreover, the prosecutor "has a legitimate interest in seeing that cases in which he believes a conviction is warranted are tried before the tribunal which the Constitution regards as the most likely to produce a fair result." See *Singer v. United States*, 380 U.S. 24, 36 (1965) (upholding constitutionality of a rule requiring prosecutor's consent to the defendant's waiver of a jury trial). Accordingly, the State has standing to object to race-based peremptory challenges exercised by criminal defendants.

CONCLUSION

The judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted.

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DECEMBER 1991